Supreme Court, U.S.
FILED

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No. 02-

IN THE

Supreme Court of the United States

PEGGY A. GALLO-LOEKS,

Petitioner,

v.

U S WEST COMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. What is the burden placed upon a victim of reverse discrimination in order to establish a prima facie claim of discrimination?

2. Did Petitioner Peggy Gallo Loeks sufficiently establish that the employer's proffered explanation for it's actions against her are false?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	vii
Opinions Below	1
Statement of Jurisdiction	1
Statutes and Regulations Involved	1
Statement of the Case	2
A. Course of Proceedings	2
Reasons for Granting the Writ	4
A. The Traditional Formula For Establishing a Prima Facie Claim of Discrimination	5
B. The Tenth Circuit and District Court Decision In This Matter	6
C. There Should Be No Difference Between The Burden Of A Minority Plaintiff and a Reverse Discrimination Plaintiff In Establishing A Claim For Unlawful Employment Discrimination	7

Contents

Page

D. Peggy Gallo Loeks Successfully Established That The Employer's Proffered Reason Was Pretextual, Thus She is Entitled To Proceed to Trial 12

Conclusion 13

TABLE OF CITED AUTHORITIES

Cases: *Page*

Bass v. Bd. of County Comm'rs., 256 F.3d 1096 (11th Cir. 2001) 4, 11

Byers v. The Dallas Morning News, Inc., 209 F.3d 419 (5th Cir. 2000) 4, 11

Collins v. School Dist. Kansas City, 727 F. Supp. 1318 (W. Dist. Mo. 1990) 5, 10, 11-12

Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993) 4

Iadimarco v. Runyon, 190 F.3d 151 (3d Cir. 1999) .. 5, 6, 11

McDonald v. Santa Fe Trail. Transp. Co., 427 U.S. 273 (1976) 6, 7, 8, 9, 10, 12

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 5, 6

Mills v. Health Care Svs. Corp., 171 F.3d 450 (7th Cir. 1999) 4

Murray v. Thistledown Racing Club, Inc., 770 F.2d 63 (6th Cir. 1985) 4

Notari v. Denver Water Dep't., 971 F.2d 585 (10th Cir. 1992) 4, 6, 7, 9, 10

Parker v. Baltimore & Ohio R.R., 652 F.2d 1012 (D.C. Cir. 1981) 4

Cited Authorities

	Page
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)	6, 13
St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)	6
Shealy v. City of Albany, Georgia, 89 F.3d 804 (11th Cir. 1996)	5
Ticali v. Roman Catholic Diocense of Brooklyn, 41 F. Supp. 2d 249 (E.D.N.Y. 1999), *aff'd*, 201 F.3d 432 (1999)	5
Trujillo v. University of Colorado Health Sciences Ctr., 157 F.3d 1211 (10th Cir. 1998)	12
Ulrich v. Exxon Co., U.S.A., 824 F. Supp. 677 (S.D. Tex. 1993)	5, 11
Statutes:	
28 U.S.C. § 1254	1
28 U.S.C. § 1291	1
28 U.S.C. § 1331	1, 2
28 U.S.C. § 1367	1
42 U.S.C. § 2000, *et seq.*	1, 2
24 C.R.S.A. § 24-34-402	2

Cited Authorities

Page

Legislative History:

110 Cong. Rec. 2578, 7213, 7218, 8912 (1964) ... 8

Other Authorities:

BERNARD BERELSON & GARY A. STEINER, HUMAN BEHAVIOR: AN INVENTORY OF SCIENTIFIC FINDINGS 500 (1964) 10

RUPERT BROWN, PREJUDICE: ITS SOCIAL PSYCHOLOGY 159 (1995) 10

Timothy K. Giordano, Comment, *Different Treatment for Non-Minority Plaintiffs Under Title VII: A Call for Modification of the Background Circumstances Test to Ensure that Separate is Equal*, 49 Emory L. J. 993 (2000) 9-10

J. Stanley Gray & Anthony H. Thompson, *The Ethnic Prejudices of White and Negro College Students*, 48 J. Abnormal and Soc. Psych. 311 (1953) 10

TABLE OF CITED AUTHORITIES

Page

Appendix A — Order And Judgment Of The United States Court Of Appeals For The Tenth Circuit Dated And Filed February 5, 2003 ..... 1a

Appendix B — Order Of The United States District Court For The District Of Colorado Dated And Filed March 22, 2002 ..... 6a

Appendix C — Judgment Of The United States District Court For The District Of Colorado Dated And Filed March 25, 2002 ..... 20a

OPINIONS BELOW

This case was heard by the United States Court of Appeals for the Tenth Circuit, case number 02-1167. The decision is unpublished, and appears in Appendix A, hereto. The decision of the United States District Court for the District of Colorado, case number 00-WM-1863 is also unpublished and appears in Appendix B, hereto.

STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331. The district court had supplemental jurisdiction over Petitioner's state law claim pursuant to 28 U.S.C. § 1367. The United States Court of Appeals for the Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The court of appeals entered its order on February 5, 2003. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 2000e-2. Unlawful employment practices

(b) Employer practices

It shall be an unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner Gallo-Loeks, Caucasian, brought claims for reverse race discrimination in violation of 42 U.S.C. § 2000e, *et seq.*, and Colorado's Anti-Discrimination Act, 24 C.R.S.A. § 24-34-402. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. U.S. West moved for, and was granted, summary judgment, and the United States District Court for the Tenth Circuit affirmed.

Ms. Gallo-Loeks' had been an employee for 22 years when claim arose in or around 1998. She was suspended for allegedly submitting false information to a third-party administrator for tuition reimbursement. Ms. Gallo-Loeks had taken what she believed was an approved class; however, unbeknownst to her, because the approved class was full, she was directed to a class which was not from an approved provider. As a consequence, Gallo-Loeks was suspended for two weeks, ordered to repay $700 within thirty days or be suspended, and placed on warning of dismissal for one year, and the discipline was made a part of her personnel file. At the time, Gallo-Loeks' supervisor was James Tarantino. Mr. Tarantino was supervised by Edna Haliburton, an African-American.

The investigation of Ms. Gallo-Loeks was highly unusual because it bypassed her immediate supervisor. Tarantino should have been informed because he was responsible for conducting a preliminary investigation and presenting data to the investigator. This was the only time, to Mr. Tarantino's knowledge, that he was not involved in such a security investigation. Instead, Haliburton and Pathways originated the investigation. Pathways administered the tuition reimbursement program.

In contrast, Audrey Christian, an African American, was investigated by her immediate supervisor, Tarantino regarding concerns he had about how Christian was using the employer's American Express credit card. Tarantino had been directed by Haliburton to investigate Christian's American Express account which was 120 days delinquent.

In reviewing Christian's receipts, Tarantino found some questionable activities, and requested that Christian turn her American Express card in to him. Instead, Tarantino learned that Haliburton had already authorized payment for Christian. Tarantino expressed to Haliburton his conclusion that Christian had submitted a false document to U.S. West, to hide the fact that she had allowed her husband to use her card, in violation of company policy, and contrary to written and verbal instructions Tarantino had issued to employees. Nonetheless, Haliburton had authorized Christian to receive a new corporate credit card against Tarantino's recommendation and advice. Tarantino then experienced a second incident with Christian in or around June 2000. Christian refused to obey direct instructions from Tarantino and Haliburton ordered Tarantino not to discipline Christian.

Tarantino's testimony included evidence that Christian had also received preferential treatment with respect to

scheduling, overtime, security investigations, shifts and days off. Tarantino testified to his belief that Haliburton chose to treat Christian more favorably.

REASONS FOR GRANTING THE WRIT

The circuits are split with respect to the burden a victim of reverse discrimination has in establishing a prima facie claim of discrimination. For example, some circuits require the Plaintiff to establish, as part of the prima facie case, "background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Mills v. Health Care Svs. Corp.*, 171 F.3d 450 (7th Cir. 1999); *Parker v. Baltimore & Ohio R.R.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981); *quoted in Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993); *see also Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985); Tenth Circuit requires a reverse discrimination Plaintiff to establish a prima facie case of discrimination and must demonstrate: (1) "show background circumstances that demonstrate that [the] employer is one of those unusual employer who discriminate against the majority." *Notari v. Denver Water Dep't.*, 971 F.2d 585, 590 (10th Cir. 1992). Alternatively; (2) the Plaintiff "must allege and produce evidence to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred." *Id.*

Other circuits and district courts place no more onerous burden on a reverse discrimination Plaintiff than on a so-called minority Plaintiff alleging discrimination. *See Byers v. The Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000); *Bass v. Bd. of County Comm'rs.*, 256 F.3d 1096, 1103 (11th Cir. 2001) (treating Plaintiff's claim of

discrimination "as discrimination claims, not as 'reverse discrimination' claims, and analyzing such claims "exactly as we would any racial discrimination claim."); *Shealy v. City of Albany, Georgia*, 89 F.3d 804, 805 (11th Cir. 1996); *Ticali v. Roman Catholic Diocense of Brooklyn*, 41 F. Supp. 2d 249, 261-52 (E.D.N.Y. 1999), *aff'd*, 201 F.3d 432 (1999); *Ulrich v. Exxon Co., U.S.A.*, 824 F. Supp. 677, 684 (S.D. Tex. 1993) (same); *Collins v. School Dist. Kansas City*, 727 F. Supp. 1318, 1322 (W. Dist. Mo. 1990) (same).

It is time for this Court to resolve this split and decide the proper burden placed upon a reverse discrimination employee Plaintiff to establish a prima facie case.

A. The Traditional Formula For Establishing a Prima Facie Claim of Discrimination

Most employers do not discriminate openly, therefore there is seldom direct evidence of discrimination. *Iadimarco v. Runyon*, 190 F.3d 151, 157 (3d Cir. 1999). The burden a minority employee has was initially laid down by this Court in the decision *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). There, this Court said that a complainant could establish a prima facie case by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. Of course, this Court went on to explain that this is not the only "pattern of proof" for setting forth a prima

facie case. *McDonald v. Santa Fe Trail. Transp. Co.*, 427 U.S. 273, 279 n.6 (1976). "The prima facie case method established in *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Iadimarco*, 190 F.3d at 161.

Once a prima facie case of discrimination has been established, the burden then shifts to the defendant to produce a nondiscriminatory reason for the actions complained of by the plaintiff. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993). This is not a burden of persuasian, but instead, is simply a burden of production. *Id.* at 207. The Plaintiff, at all times, is responsible for persuading the trier of fact that the real reasons for the actions taken is impermissible discrimination. *Id.* The Plaintiff may satisfy this burden through the evidence of the prima facia case along with establishing sufficient evidence indicating that the defendant's reason is false. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146-47 (2000).

B. The Tenth Circuit and District Court Decision In This Matter

The trial court granted summary judgment based upon the heightened requirements of *Notari v. Denver Water Dep't.*, 971 F.2d 585 (10th Cir. 1992). *Notari*, states that when there is no direct evidence of individual discrimination, a Plaintiff in a reverse discrimination lawsuit may state a "prima facie" case under two scenarios: (1) The Plaintiff can "show background circumstances that demonstrate that his employer is one of those unusual employer who discriminate against the majority." *Id.* at 590 or; (2) the Plaintiff "must allege and produce evidence

to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred." *Id.* Here, the trial court claimed that Plaintiff failed to provide evidence sufficient to establish a prima facie claim of reverse discrimination under either requirement. (App. B, at 13a, 18a). The Tenth Circuit's decision is too vague to indicate the precise analysis utilized in affirming the district court's decision. (App. A, at 5a).

C. There Should Be No Difference Between The Burden Of A Minority Plaintiff and a Reverse Discrimination Plaintiff In Establishing A Claim For Unlawful Employment Discrimination

This Court has clearly recognized the truth that Title VII protects men and whites and that they are equally protected in Title VII actions. The leading case on this issue is *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). In that case, this Court reversed a decision granting a motion to dismiss against the white plaintiffs. The facts alleged were: On September 26, 1970, the two white plaintiffs and an African-American employee "were jointly and severally charged with misappropriating 60 one-gallon cans of antifreeze . . . Six days later, [Plaintiffs] were fired by Santa Fe, while [the black employee] was retained." *Id.* at 276. The district court ruled that "the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted." *Id.* at 278. The court of appeals affirmed and noted that the plaintiffs had not alleged that they were *falsely* accused. *Id.* at 278.

In reversing, this Court recognized that Title VII's "terms are not limited to discrimination against members of any particular race." *Id.* at 278-79, 96 S. Ct. at 1578. This Court thoroughly reviewed the legislative history of Title VII which overwhelmingly demonstrated that Title VII was intended to protected against discrimination against whites and "all Americans." *Id.* at 280; *citing and/or quoting* 110 Cong. Rec. 2578, 7213, 7218, 8912 (1964) (the remarks of Rep. Celler, and Sens. Clark, Case and Williams).

In light of the express language of the statute, and the legislative history of Title VII, this Court went on to pronounce "that Title VII prohibits racial discrimination against the white petitioners in this case *upon the same standards* as would be applicable were they Negroes . . ." *Id.* at 280. (Emphasis added). This Court found it irrelevant that the Plaintiffs' "dismissal was based upon their commission of a serious criminal offense against their employer." *Id.* at 281.

The Supreme Court explained its reasoning as follows:

> Fairly read, the complaint asserted that petitioners were discharged for their alleged participation in a misappropriation of cargo entrusted to Santa Fe, but that a fellow employee, likewise implicated, was not so disciplined, and that the reason for the discrepancy in discipline was that the favored employee is Negro while petitioners are white. (Citations omitted). While Santa Fe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be 'applied, alike to members of all races,' and Title VII is violated if, as petitioners alleged, it was not."

Id. 282-83, 96 S. Ct. at 2580.

Finally, this court concluded with the understanding that while "[i]t may be that theft of property entrusted to an employer for carriage is a more compelling basis for discharge than obstruction of an employer's traffic arteries . . . this does not diminish the illogic in retaining guilty employees of one color while discharging those of another color." *Id.* at 284.

This reasoning is entirely undermined by requiring plaintiffs who are not in a minority group are subjected to a higher burden in order to establish a prima facie case for discrimination. Here, indirect evidence supports a reasonable probability that Gallo Loeks would not have been disciplined if her race was African-American rather than Caucasian. Such evidence is sufficient to establish a *prima facie* case of discrimination. *Notari v. Denver Water Dep't.*, 971 F.2d at 590.

Here, Christian, an African-American, was provided great favoritism and repeatedly protected from her acts of misconduct, including her attempt to inappropriately benefit from the use of the company credit card. Her protector, Haliburton, an African-American, also supervised Gallo Loeks but took no steps to protect Gallo Loeks from similar allegations, despite persuasive evidence that, rather than any intentional misconduct, a simple mistake had occurred. Tarantino, the immediate supervisor of both Gallo Loeks and Christian, was very concerned but the inequality of treatment in these two cases.

Evidence suggests that minority supervisors "engage in discriminatory [employment] practices, much the same way whites often discriminatorily hire their 'own.'" Timothy K. Giordano, Comment, *Different Treatment for Non-Minority*

Plaintiffs Under Title VII: A Call for Modification of the Background Circumstances Test to Ensure that Separate is Equal, 49 Emory L. J. 993, 995 (2000). In support of this understanding, Mr. Giordano cites: RUPERT BROWN, PREJUDICE: ITS SOCIAL PSYCHOLOGY 159 (1995); BERNARD BERELSON & GARY A. STEINER, HUMAN BEHAVIOR: AN INVENTORY OF SCIENTIFIC FINDINGS 500-01 (1964); AND J. Stanley Gray & Anthony H. Thompson, *The Ethnic Prejudices of White and Negro College Students*, 48 J. Abnormal and Soc. Psych. 311 (1953). *Id.* n.15, 210-11 and accompanying text. Thus, the rationale supporting the courts who require a separate framework for establishing, by circumstantial evidence, a prima facie case of discrimination, are basing their rulings often on a flawed understanding of the context of discrimination against employees in a majority group.

Moreover, the higher burden placed on Plaintiff under *Notari*, as a member of the "majority" group, simply because she is a member of the "majority," is a blatant form of discrimination in itself. *See McDonald v. Santa Fe. Trail Transportation Co.*, 427 U.S. 273, 279-80 (1976). The language of the cases supporting the heightened burden on reverse discrimination claims is grounded in discussions about the "group" to which the individual employee belongs. *See Notari*, 971 F.2d at 589. However, "[a] given employer may discriminate against an individual white worker even when no evidence demonstrates that the employer generally favors workers who belong to historically disadvantaged groups." *Id.* at 590. Thus, it does not make sense to increase Plaintiff's burden simply because she is white. *See Collins v. Sch. Dist. of Kansas City*, 727 F. Supp. 1318, 1322 (W.D. Mo. 1990) (stating that it is "unconscionable for the courts to erect this arbitrary barrier which serves only to frustrate those who have legitimate Title VII claims.").

Requiring a reverse discrimination Plaintiff to provide evidence that otherwise is only required to rebut the employer's proffered reason undermines the very reasoning of the burden-shifting regime, "to make it easier for employees to bring claims that would otherwise be extraordinarily difficult to prove." *Iadimarco v. Runyon*, 190 F.3d 151, 161 (3d Cir. 1999).

Therefore, other Circuits are retreating from the heightened requirements and instead, requiring only that the Plaintiff demonstrate that he or she was in a protected group, and of course, Caucasians are in a group protected by Title VII. *See Byers v. The Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000); *Bass v. Bd. of County Comm'rs.*, 256 F.3d 1096, 1103 (11th Cir. 2001) (treating Plaintiff's claim of discriminations "as discrimination claims, not as 'reverse discrimination' claims, and analyzing such claims exactly as we would any racial discrimination claim.").

Furthermore, the approach adopted by most circuits, requiring the establishment of background circumstances fail to properly focus upon the fundamental evil in which Title VII was established to abolish.

> The principal focus of the statutes is the protection of the individual employee, rather than the protection of the protected group as a whole. (Citations omitted). Section 1981, like Title VII, does not 'give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.'

Ulrich v. Exxon Co., U.S.A., 824 F. Supp. 677 (S.D. Tex. 1993); *see also Collins v. Sch. Dist. of Kansas City*, 727

F. Supp. 1318, 1322 (W.D. Mo. 1990) (stating that it is "unconscionable for the courts to erect this arbitrary barrier which serves only to frustrate those who have legitimate Title VII claims."). Finally, placing such an onerous burden on a reverse discrimination victim only promotes the allegation that Title VII exists not to promote equal opportunities, but instead provides minority individuals with special rights. This misconception undermines the perception of the statute by the public and therefore, its remedial objective.

Here, Plaintiff established a prima facie claim of discrimination by establishing that: (1) she was a member of a protected group; she suffered an adverse employment action, and (2) she was treated differently and less favorably than a similarly situated African-American employee. *See Trujillo v. University of Colorado Health Sciences Ctr.*, 157 F.3d 1211, 1215 (10th Cir. 1998). Plaintiff's status as a Caucasian should be considered irrelevant to her success in establishing a prima facie case.

D. Peggy Gallo Loeks Successfully Established That The Employer's Proffered Reason Was Pretextual, Thus She is Entitled To Proceed to Trial

Finally, summary judgment was inappropriate because Ms. Gallo Loeks produced sufficient evidence demonstrating that the defendant's proffered reasons for the disparate manner in which she was treated was pretextual. As in the *McDonald* case *supra*, this case involves the illogic of disciplining a white employee, while essentially allowing a similarly situated African-American employee to do whatever she wishes. Here, the evidence is even more stark, as the evidence does not establish anything more than an innocent mistake on the part of Gallo Loeks and the course instructor.

Furthermore the evidence established that Haliburton repeatedly, and contrary to the policies of the employer, protected the African-American employee, by circumventing her immediate supervisor Tarantino. Meanwhile, this same supervisor, Haliburton, by-passed Tarantino in engaging in an overly vindictive pursuit against Gallo Loeks to punish her for a simple innocent mistake. Under these circumstances, sufficient evidence exists on the issue of pretext, precluding summary judgment. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to issue a writ of certiorari to review the decisions of the United States Court of Appeals for the Tenth Circuit and the United States District Court for the District of Colorado, and to resolve the split in the circuits regarding the burden placed upon a reverse discrimination plaintiff to establish a prima facie case. Furthermore, it is requested that this Court find that the plaintiff in this matter successfully established a prima facie case of discrimination as well as pretext for discrimination and remand this matter so that it may proceed to trial.

Respectfully submitted,

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APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED FEBRUARY 5, 2003

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 02-1167
D.C. No. 00-WM-1863
(D. Colorado)

PEGGY A. GALLO-LOEKS,

Plaintiff - Appellant,

v.

U S WEST COMMUNICATIONS, INC.,

Defendant - Appellee.

ORDER AND JUDGMENT*

Before **EBEL**, **BALDOCK**, and **LUCERO**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Appendix A

See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Peggy A. Gallo-Loeks appeals the district court's summary judgment in favor of her employer, U S West, on her claims that U S West engaged in reverse discrimination in violation of Title VII, 42 U.S.C. §§ 2000e to 2000e-17, and the Colorado Anti-Discrimination Act, Colo. Rev. Stat. § 24-34-402. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

Background

Ms. Gallo-Loeks, who is white, was disciplined after she submitted a request for tuition reimbursement from an educational provider that was not eligible for tuition reimbursement. When she was informed that the provider was ineligible, Ms. Gallo-Loeks submitted additional documentation and received reimbursement. Following an investigation that included her explanation for the confusion over the billing, Ms. Gallo-Loeks was required to repay the tuition money, she was placed on warning of dismissal for one year, and an entry was placed permanently in her employment file.

During the approximate time period that Ms. Gallo-Loeks was investigated and reprimanded, another employee was the subject of an investigation into her use of a company credit card. The other employee, Ms. Christian, is an African-American. Ms. Christian used the credit card to charge two days' personal use of a rental car, which was a change from the original authorization for a rental car. Although she had

obtained a supervisor's prior permission for the car expense, it was determined that she had used bad judgment by not reconfirming her travel plans. She received a warning and was required to reimburse her employer for the two days' rental car charge.

Based on these circumstances, Ms. Gallo-Loeks claimed that U S West treated her less favorably than Ms. Christian, in violation of Title VII and Colorado state law. She asserted that she was reprimanded more severely than Ms. Christian because she is white.

The district court first considered whether Ms. Gallo-Loeks established a prima facie case under the familiar *McDonnell Douglas* burden-shifting scheme, whereby the plaintiff must first establish a prima facie case of discrimination, after which the employer must present a nondiscriminatory reason for the challenged workplace action. *Notari v. Denver Water Dep't,* 971 F.2d 585, 588 (10th Cir. 1992) (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)). If those conditions are met, the plaintiff then has an opportunity to show that the proffered reason was a pretext for discrimination. *Id.*

In evaluating Ms. Gallo Loeks' prima facie showing, the district court applied the *Notari* standard. Under *Notari,* for a reverse discrimination claimant to establish a prima facie case of discrimination under the *McDonnell Douglas* paradigm, she must "establish background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority." *Id.* at 589. After finding that Ms. Gallo Loeks had not made the requisite

allegations of background circumstances, the district court evaluated whether she had produced direct evidence of discrimination or indirect evidence that made it reasonably probable that she would have been treated more favorably but for her status as a white person. Appellant's App. at 247 (citing *Notari,* 971 F.2d at 590). The district court determined that Ms. Gallo-Loeks had not offered any direct evidence of discrimination. *Id.* at 249 & n.4. Therefore, the district court examined the indirect evidence of discrimination and concluded that Ms. Gallo-Loeks had "not produced evidence 'to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred.'" *Id.* at 252 (quoting *Notari,* 971 F.2d at 590). Accordingly, the district court granted summary judgment in U S West's favor on the Title VII claims. Because Ms. Gallo-Loeks did not argue that a different standard or analysis applied to the state-law claims, the district court granted summary judgment in U S West's favor on those claims, as well.

Ms. Gallo-Loeks appeals, arguing that this court should abandon the *Notari* requirements for a prima facie case in a reverse discrimination claim. She also challenges the district court's conclusion that her indirect evidence of discrimination was insufficient to resist summary judgment. She does not claim that she had direct evidence of discrimination.

Analysis

We review de novo the district court's grant of summary judgment, viewing the record in the light most favorable to the party opposing summary judgment. *McKnight v. Kimberly*

Clark Corp., 149 F.3d 1125, 1128 (10th Cir. 1998). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c).

We decline Ms. Gallo Loeks' invitation to abandon *Notari,* because one panel of this court cannot overrule the judgment of another, "absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1229 (10th Cir. 2001) (further quotation omitted).

We have carefully reviewed the record on appeal, as well as the briefs submitted by the parties. Applying the standards set out above, we affirm the judgment for the reasons stated in the district court's March 22, 2002 order on motion for summary judgment.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

David M. Ebel
Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED MARCH 22, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE WALKER D. MILLER

Civil Action No. 00-WM-1863

PEGGY A. GALLO-LOEKS,

Plaintiff,

v.

U.S. WEST COMMUNICATIONS, INC.

Defendant.

ORDER ON MOTION FOR SUMMARY JUDGMENT

Miller, J.

This matter is before me on the defendant's motion for summary judgment, filed July 20, 2001. I have considered the parties' written arguments and their tendered evidence and have determined that oral argument is not required. For the reasons that follow, the motion will be granted.

Appendix B

Background

Plaintiff Peggy Gallo-Loeks brings claims for reverse race discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1-2000e-17, and the Colorado Anti-Discrimination Act, C.R.S. § 24-34-402.

The following summary is drawn from the parties' factual statements in the summary judgment briefs.[1]

Plaintiff, who is Caucasian, has been employed by US West for approximately twenty-two years. She was worked as a directory records clerk, frame attendant, and central office technician; when she was a frame attendant, she was supervised by Edna Haliburton, an African-American woman.

Plaintiff's allegations of discrimination arise from events surrounding her claims for tuition reimbursement under a benefit program available to US West employees. She was temporarily suspended in 1998 on grounds of submitting false information to Pathways, a third-party administrator of the tuition reimbursement program.

Among the approved classes for the tuition reimbursement program were classes available at the Arvada Center for the Performing Arts. Sometime in early-to-mid 1997, plaintiff attempted to enroll in a voice-over talent workshop at the Arvada Center taught by George Flynn. The class was full, and she was placed on a waiting list. She left several voice messages for Mr. Flynn indicating her interest in the workshop; several months

1. Plaintiff did not comply with my pretrial procedures regarding responding to defendant's statement of undisputed facts in separately numbered paragraphs.

later, Mr. Flynn's daughter informed plaintiff that he had openings in another workshop. She enrolled in that class and others, all taught by Mr. Flynn.

Plaintiff later sought reimbursement for her classes by submitting forms provided by Pathways. Pathways refused to approve her request because the classes were not offered by an eligible provider. Before leaving on a vacation, plaintiff resubmitted her form, indicating that the provider "should be" the Arvada Center; she included two receipts, in the combined amount of $675, from Mr. Flynn with "Arvada Center for the Arts Statement" at the top. Upon learning that the statements were not from the Arvada Center, Pathways asked that plaintiff submit other receipts showing she had paid the Arvada Center for the classes. Plaintiff does not recall ever providing additional receipts. She was apparently successful in obtaining reimbursement for her classes.

Betty Sweeny, a Pathways employee, notified US West that plaintiff may have submitted false information to obtain tuition reimbursement.

When plaintiff returned from her vacation, her supervisor, Jim Tarantino, notified her that she was the subject of a security investigation. When she called Pathways, she was informed that Mr. Flynn was not a teacher at the Arvada Center, that she was not a student there, and that she had never taken the classes for which she sought reimbursement. She contacted Mr. Flynn for information regarding the classes. Mr. Flynn provided her with a letter indicating that she had attended a workshop put together to accommodate students who were unable to attend the Arvada

Center classes and that he and plaintiff had mistakenly assumed she was an Arvada Center student. Plaintiff's union representative, Mary Sue Curtis, submitted Mr. Flynn's letter to US West along with other information, including brochures for the class through the Arvada Center and Mr. Flynn's resume.

Denise Hayden, a US West security manager, investigated plaintiff's reimbursement claim. After a first security meeting was cut short when plaintiff was not allowed to have two union representatives present (although two company representative attended), Ms. Curtis asked Ms. Hayden whether the packet of information submitted resolved any concerns and whether the investigation would be closed soon. Ms. Hayden responded that she was keeping the case open.

At a second security meeting, Ms. Hayden stated that US West believed plaintiff had engaged in fraud by submitting a receipt for reimbursement.

In early October 1998, Ms. Haliburton informed plaintiff that she was on suspension for two weeks. Plaintiff was ordered to repay approximately $700 within thirty days or be terminated, she was placed on warning of dismissal for one year, and an entry of the discipline was placed in her permanent file.

In this lawsuit, plaintiff argues her treatment by US West was the result of reverse race discrimination, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1-2000e-17, and the Colorado Anti-Discrimination Act, C.R.S. § 24-34-402.

Appendix B

Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. A factual issue is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby*, 106 S.Ct. 2505, 2510 (1986).

Where "the moving party does not bear the ultimate burden of persuasion at trial, it may satisfy its burden at the summary judgment stage by identifying 'a lack of evidence for the nonmovant on an essential element of the nonmovant's claim.'" *Bausman v. Interstate Brands Corp.*, 252 F.3d 1111, 1115 (10th Cir. 2001) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998)). Then, "[t]o avoid summary judgment, the nonmovant must establish, at a minimum, an inference of the presence of each element essential to the case." *Id.*

In this employment case, plaintiff bears the initial burden of presenting a *prima facie* case of discrimination. US West must then produce evidence that it acted upon legitimate, non-discriminatory reasons. If this burden is met, plaintiff must prove that the reasons offered by her employer were a pretext for discrimination. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747 (1993); *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817, 1824 (1973).

Appendix B

Discussion

In *McDonald v. Santa Fe Trail Trans. Co.*, 96 S.Ct. 2574, 2579 (1976), the Supreme Court held that Title VII prohibits racial discrimination against white persons "upon the same standards as would be applicable" for allegations brought by blacks. "[Title VII's] terms are not limited to discrimination against members of any particular race." *Id.* at 2578.

1. *Prima Facie Case*[2]

US West first argues that plaintiff cannot establish a *prima facie* case of racial discrimination.

Plaintiff's discrimination claims are based on her allegation that US West subjected her to disparate treatment, *i.e.*, that it treated her less favorably than similarly situated black employees. Under such circumstances, the *McDonnell Douglas* formulation of a *prima facie* case generally requires a demonstration that: (1) the plaintiff belongs to a protected group, (2) she suffered an adverse employment action, and (3) her employer treated similarly situated employees differently. *Trujillo v. University of Colorado Health Sciences Center*, 157 F.3d 1211, 1215 (10th Cir. 1998).

---

2. In the first two briefs, neither party clearly moves beyond the *prima facie* analysis to any argument regarding the legitimacy of US West's proffered reasons for plaintiff's suspension or to evidence of pretext (although plaintiff states conclusorily that the indirect evidence for her *prima facie* case is sufficient to demonstrate pretext. Response, at 13). In its reply brief, however, US West discusses plaintiff's arguments in terms of pretext.

Appendix B

In cases concerning reverse race discrimination, however, the Tenth Circuit applies a modified *prima facie* case analysis. *Notari v. Denver Water Dep't*, 971 F.2d 585, 588-89 (10th Cir. 1992). Under this modification,

> a Title VII disparate treatment plaintiff who pursues a reverse discrimination claim, and seeks to obtain the benefit of the *McDonnell Douglas* presumption, must, in lieu of showing that he belongs to a protected group, establish background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority.

Id. at 589. *See also Taken v. Oklahoma Corp. Comm'n*, 125 F.3d 1366, 1369 (10th Cir. 1997). "The *McDonnell Douglas* presumption-that is, the presumption that unless otherwise explained, discrimination is more likely than not the reason for the challenged decision is valid for a reverse discrimination claimant only when the requisite background circumstances exist." *Notari*, 971 F.2d at 589.

The *McDonnell Douglas* formulation is not the only manner in which plaintiff may establish a *prima facie* case, however. She may also meet her burden with: (1) direct evidence of discrimination; or (2) indirect evidence sufficient to support a reasonable probability, that but for her status the challenged employment decision would have favored the plaintiff. *Id.* at 590. A plaintiff who relies on such direct or indirect evidence, "is not entitled to rely on the presumption that is implicit in the *McDonnell Douglas prima facie* case analysis." *Id.*

> In other words, it is not enough, under this alternative formulation, for a plaintiff merely to allege that he was qualified and that someone with different characteristics was the beneficiary of the challenged employment decision. Instead, the plaintiff must allege and produce evidence to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred.

Id.

US West contends plaintiff cannot meet her *prima facie* case because she has no evidence suggesting that it is "one of those unusual employers who discriminates against the majority." In her deposition, plaintiff conceded that she never heard any member of US West's (or Qwest's) management make any remarks about race and that she had been employed by US West for approximately twenty years before she experienced any alleged racial discrimination. Gallo deposition, at 30, 308. In the Voice Messaging section where plaintiff worked, the majority of central office technicians and managers are Caucasian. *Id.* at 39-42.

In her response (which is not well-organized), plaintiff argues the evidence that US West is an "unusual" employer who discriminates against the majority is that US West treated black employees more favorably. She summarizes her *prima facie* case as consisting of proof that: (1) she was a qualified white female employee, (2) she was suspended without pay, (3) a black co-worker violated company policies but was not disciplined.

Appendix B

Plaintiff equates two elements of her *prima facie* case (that she was subjected to an adverse employment action and that a similarly situated black employee was treated differently) with "background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority." *Notari*, 971 F.2d at 589. This does not meet the modified *prima facie* case set forth in *Notari*.[3]

US West next argues that plaintiff does not have direct evidence of discrimination[4] or indirect evidence that would support a reasonable probability that she would not have been suspended but for the fact that she is white. On the issue of indirect evidence of disparate treatment, it asserts that plaintiff cannot demonstrate a probability that she was suspended because of her race in light of the evidence that many different individuals were involved in the investigatory and decision-making stages of her discipline.

---

3. Plaintiff later argues that the modified *prima facie* case of *Notari*, placing a higher burden on her simply because she is a member of a "majority" is "a blatant form of discrimination in itself." Response, at 13-14. She cites *Notari*'s discussion of this very fact but omits its conclusion: that to counterbalance the higher *prima facie* burden under the *McDonnell Douglas* presumption analysis, a reverse discrimination plaintiff may also present a *prima facie* case with "indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff[.]" *Notari*, 971 F.2d at 590.

4. Plaintiff does not argue that there is direct evidence of discrimination in this case.

Appendix B

US West states that Ms. Hayden investigated plaintiff's claim for reimbursement to Pathways, that Ms. Haliburton did not provide any relevant information to Ms. Hayden in the investigation, and that the participants in the decision to suspend plaintiff were Melanie Curry (Caucasian), Dana Tonelli (Caucasian), Ms. Haliburton (African American), and Donna McNamara (Caucasian). Haliburton deposition, at 20-22.

Finally, US West contends that plaintiff and the targeted black employee, Audrey Christian, were not similarly situated, either with respect to the persons involved in the decision-making process or with regard to the nature of their offenses. The investigation against plaintiff concluded that she had submitted false information and documents to Pathways to obtain tuition reimbursement.

Ms. Christian charged personal expenses to a company credit card in connection with a training session in Milpitas, California. Ms. Christian had obtained prior permission from her manager, Peggy Moore, to take two days vacation in Los Angeles prior to the training session and to charge two day's personal use of a rental car to the company credit card. When the training schedule changed, Ms. Christian's husband flew to Los Angeles, rented the car, and drove to Milpitas to meet her; Ms. Christian did not discuss the payment for the rental car with Ms. Moore after her training session was changed. In investigating Ms. Christian's conduct, Ms. Haliburton spoke to Ms. Moore, who confirmed that she had given Ms. Christian permission to charge the company for two day's personal use of a rental car. Ms. Haliburton concluded that Ms. Christian had not submitted a false expense report or

improperly charged the company for personal expenses because she had prior permission from Ms. Moore. Ms. Haliburton found Ms. Christian had used bad judgment in not re-confirming the arrangements after the training schedule changed. Ms. Christian received a warning and was required to reimburse the company for the two days' use of the rental car.[5] Ms. Haliburton contacted Ms. Currie, a human resources representative, about Ms. Christian's conduct; Ms. Currie determined the matter did not warrant a security investigation.

In support of her claim that there is indirect evidence establishing a reasonable probability that she was the victim of race discrimination, plaintiff states the following: (1) her suspension was "entirely unwarranted" because she reasonably believed she was taking the class through the Arvada Center (and she had no part in preparing the receipts she received from Mr. Flynn), (2) Audrey Christian misused the company credit card but was not subjected to a security investigation or other discipline, and (3) "[obviously, the discipline [plaintiff] received was more severe than Ms. Christian's." Response, at 13.

Plaintiff later provides a more concrete analysis of the issue of whether she and Ms. Christian were similarly situated. She states that they were both in the same work group and were supervised by Mr. Tarantino and that Mr. Tarantino reported to Ms. Haliburton during the relevant time period.

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5. There may be some dispute over whether reimbursement was ordered. Plaintiff seems to believe, based on Mr. Tarantino's deposition, that she did not have to repay the rental charges. Tarantino deposition, at 83-84.

Plaintiff does not dispute, however, that the employment/ disciplinary decisions were made by different people.

Plaintiff also cites differences in the investigations, stating that, contrary to usual practice, her supervisor, Mr. Tarantino, was not involved in her investigation; instead, the investigation involved Pathways, security personnel and Ms. Haliburton. She says she was treated differently in this respect from other employees under Mr. Tarantino's supervision, but she does not provide any evidence regarding whether these employees were black or white.

Next, plaintiff states that another US West employee had taken the same class as she had and had been reimbursed by Pathways; again she provides no evidence regarding whether this employee was black or white.

Finally, plaintiff makes general statements that Ms. Christian was "treated more favorably with respect to scheduling, overtime, security investigations, shifts and days off." Response, at 11. Although she cites excerpts from Ms. Curtis's deposition, there is no evidence regarding who made the challenged decisions in favor of Ms. Christian nor any evidence that any other employees were treated less favorably in any of the cited areas.

2. *Proffered Reasons/Pretext*

US West suspended plaintiff based on its conclusion that she had submitted a false application for reimbursement to Pathways. Plaintiff argues she reasonably believed she had taken the class through the Arvada Center.

In reply, US West states that her reasonable belief is irrelevant to the validity of its stated reasons for her suspension. *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999) (issue is not whether employer's proffered reasons were "wise, fair or correct," but whether employer "honestly believed those reasons and acted in good faith upon those beliefs"). It points out that she presented no evidence that it did not believe she had submitted false information or that it failed to act in good faith based on the results of the security investigation.

With regard to the comparison of plaintiff and Ms. Christian, US West replies that there is no dispute that Ms. Christian had prior permission for the use of the credit card for the rental car. It states that, to establish pretext, plaintiff must demonstrate some nexus between the decision to suspend her and the cited evidence of pretext. *See, e.g., Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1209-10 (10th Cir. 1999).

With respect to plaintiff's cited evidence that Ms. Curtis believed Ms. Christian received more favorable treatment than other employees, US West contends the testimony is based on hearsay statements from other employees.

I agree with US West that plaintiff has not produced evidence "to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred." *Notari*, 971 F.2d at 590.

Appendix B

3. *State Law Claim*

Although US West argues Colorado courts have not recognized a cause of action for reverse discrimination, plaintiff treats her federal and state claims together and does not argue that any different standard or analysis applies under Colorado law.

Thus, my conclusion on the Title VII claim covers the state law claim as well.

Accordingly, it is ordered:

1. Defendant's motion for summary judgment, filed July 20, 2001, is granted.

2. Judgment shall enter in favor of defendant and against plaintiff on all claims, dismissing this case with prejudice.

3. Defendant may have its costs.

DATED at Denver, Colorado, this 22nd day of March, 2002.

BY THE COURT:

s/ Walker D. Miller
Walker D. Miller
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED MARCH 25, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE WALKER D. MILLER

Civil Action No. 00-WM-1863

PEGGY A. GALLO-LOEKS,

Plaintiff,

v.

U.S. WEST COMMUNICATIONS, INC.,

Defendant.

JUDGMENT

Pursuant to and in accordance with the Order entered on March 22, 2002, by Judge Walker D. Miller, which is incorporated herein by reference as if fully set forth, it is

ORDERED that defendant's motion for summary judgment, filed July 20, 2001 is granted. It is

FURTHER ORDERED that judgment shall enter in favor of defendant U.S. West Communications, Inc. and against plaintiff Peggy A. Gallo-Loeks. It is

Appendix C

FURTHER ORDERED that the complaint and cause of action are dismissed with prejudice. It is

FURTHER ORDERED that defendant may have its costs upon filing a bill of costs within ten days of entry of judgment.

DATED at Denver, Colorado, this 25th day of March, 2002.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

By: s/ Stephen P. Ehrlich
Stephen P. Ehrlich
Chief Deputy Clerk

Supreme Court, U.S.
FILED
JUL 11 2003
OFFICE OF THE CLERK

(2)

No. 02-1638

IN THE

Supreme Court of the United States

PEGGY A. GALLO-LOEKS,

Petitioner,

v.

QWEST CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the standards for determining whether a plaintiff has established a *prima facie* case of reverse discrimination set forth in *Notari v. Denver Water Dep't*, 971 F.2d 585 (10th Cir. 1992), and applied to Petitioner below, allow Petitioner the opportunity to present facts sufficient to establish an inference of discrimination, as required by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)?

2. Did the standards applied to Petitioner below for determining whether she established her *prima facie* case, taken together, materially differ from the standard, which Petitioner seeks to have applied to her now, utilized in the Tenth Circuit for a disparate discipline claim by a minority plaintiff?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent respectfully submits this Corporate Disclosure Statement:

Qwest Corporation, f/k/a U S WEST Communications, Inc., the Respondent in this case, is a wholly owned subsidiary of Qwest Services Corporation. Qwest Services Corporation is a wholly owned subsidiary of Qwest Communications International, Inc.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
Reasons for Denying the Petition	4
I. The Decision Below Is Not In Conflict With Any Decision Of This Court.	4
A. The *Prima Facie* Case Requirements Applied To Petitioner In The Decision Below Are Consistent With *McDonnell* Douglas.	5
1. The *McDonnell Douglas Prima Facie* Case Is Simply A Requirement That The Plaintiff Present Evidence Sufficient To Create An Inference of Discrimination.	5
2. The Tenth Circuit Standard For Establishing A *Prima Facie* Case Of Reverse Discrimination Upholds This Long-Standing *McDonnell Douglas* Requirement.	9

Contents

Page

B. There Is No Difference Within The Tenth Circuit Between The *Prima Facie* Case Requirements Applied To Petitioner Below And The Prima Facie Requirements For A Minority Plaintiff To Establish The Same Case Of Disparate Discipline. 12

II. The Question Presented Has No Bearing On The Outcome Of This Case. 15

III. There Is No Circuit Split Regarding The Burden Of Proof Required To Establish A Prima Facie Case Of Reverse Discrimination And The Split Regarding The Precise Pattern Of Proof Required Is Not A Compelling Reason To Grant Certiorari Here. 17

Conclusion 21

TABLE OF CITED AUTHORITIES

Page

Cases:

Archuletta v. Colorado Dep't of Prob., 46 F. Supp. 2d 1100 (D. Colo. 1998) 12, 19

Bass v. Bd. of County Comm'rs, 256 F.3d 1095 (11th Cir. 2001) 18

Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) 5, 6, 7, 11

Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993) .. 18, 19, 20

Hysten v. Burlington N. and Santa Fe Ry. Co., 296 F.3d 1177 (10th Cir. 2002) 13

Iadimarco v. Runyon, 190 F.3d 151 (3d Cir. 1999) 6, 11, 18, 19

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 6, 7

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) 4, 12, 14

McDonnell Douglas v. Green, 411 U.S. 792 (1973) ..... *passim*

Mills v. Health Care Servs. Corp., 171 F.3d 450 (7th Cir. 1999) 19

Cited Authorities

Page

Notari v. Denver Water Dep't, 971 F.2d 585 (10th Cir. 1992) ..... *passim*

O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996) 8, 11, 12, 20

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 7

Taken v. Oklahoma Corp. Comm'n, 934 F. Supp. 1294 (W.D. Okla. 1996), *aff'd*, 125 F.3d 1366 (10th Cir. 1997) 12, 19

Texas Dep't of Comty. Affairs v. Burdine, 450 U.S. 248 (1981) 7, 8, 12, 20

Trujillo v. Univ. of Colorado Health Scis. Ctr., 157 F.3d 1211 (10th Cir. 1998) 13, 14, 17

Watts v. City of Norman, 270 F.3d 1288 (10th Cir. 2001), *cert. denied*, 535 U.S. 1055 (2002) 13

Statutes:

42 U.S.C. § 2000e-2 5

42 U.S.C. §§ 2000e-1 to 2000e-17 1

STATEMENT OF THE CASE

Petitioner filed suit against Respondent U S West Corporation ("U S WEST") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to 2000e-17 ("Title VII"), after she was suspended for two weeks for having submitted false information to Pathways, a third-party administrator of U S WEST's tuition reimbursement benefit program. (App. 7a). Although Petitioner never experienced or witnessed any racially discriminatory acts against Caucasian employees in her 22 years at U S WEST, (App. 13a), Petitioner claimed she was the victim of discrimination because an African-American employee was treated more favorably under circumstances she claimed were similar to her own. (Pet. at 3-4).

Petitioner had taken a voice workshop from an individual named George Flynn. (App. 7a-8a). Petitioner sought reimbursement for the workshop from Pathways, identifying the workshop provider as Rocky Mountain Feature Project. (Record 24, Exh. B). Pathways denied Petitioner's request because that entity was not an authorized provider under U S WEST's tuition reimbursement program. (App. 8a). Petitioner resubmitted the form for the same class, but changed the provider to the Arvada Center for the Performing Arts ("Arvada Center"), an authorized provider. (App. 8a). She attached invoices for the workshop marked "Arvada Center for the Arts Statement." (App. 8a). Petitioner was reimbursed for the class. (App. 8a).

Pathways later determined that Petitioner did not take classes from the Arvada Center. (App. 8a). Nor was the invoice attached to Petitioner's reimbursement claim issued by the Arvada Center. (App. 8a). Petitioner claimed that she

mistakenly assumed she was an Arvada Center student. (App. 9a). It was undisputed, however, that Petitioner had never been to the Arvada Center, never completed paperwork from the Center and never paid money to the Center. (Record 24, Exh. A, pp. 114-117).

A Pathways representative notified U S WEST that Petitioner may have submitted false information to obtain tuition reimbursement. (App. 8a). U S WEST initiated an investigation. (App. 8a). The investigator, a Hispanic female, determined Petitioner had acted improperly in obtaining reimbursement. (App. 9a). Petitioner was suspended and required to repay the reimbursed monies ($675.00). (App. 9a). The decision to suspend Petitioner was made by an African-American woman, Edna Haliburton, who supervised Petitioner's direct supervisor, and three Caucasian women. (App. 13a).

The African-American employee to whom Petitioner compared herself had charged personal use of a rental car on a company credit card. (App. 15a). The employee's supervisor, however, had authorized her to fly into Los Angeles for a vacation with her spouse two days prior to training in Northern California and to drive to the training at U S WEST's expense. (App. 15a). After the employee and her spouse made their travel plans, the date of the training session changed. (App. 15a). As a result, only the husband flew into Los Angeles. He rented the car and drove up to meet his wife. (App. 15a). The employee still charged the rental car use to U S WEST. (App. 15a). Because she had prior permission to rent the car at company expense and did not submit any falsified documents, Ms. Haliburton concluded that the employee's actions were not dishonest.

(App. 15a-16a). Ms. Haliburton did issue the employee a written warning for not reconfirming the travel arrangements after the training date changed. (App. 16a).

The United States District Court for the District of Colorado granted summary judgment in favor of U S WEST on the ground that Petitioner failed to state a *prima facie* case of reverse race discrimination under any of the alternatives for establishing a *prima facie* case set out in *Notari v. Denver Water Dep't*, 971 F.2d 585, 588-89 (10th Cir. 1992). (App. 14a, 18a). First, since the majority of Petitioner's co-workers and managers were white, and Petitioner never witnessed any racial discrimination against Caucasian employees in her 22 years as an employee, the District Court found Petitioner could not meet the first prong of the modified *McDonnell Douglas prima facie* case for reverse discrimination: showing "background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority." (App. 13a-14a).

The District Court also found that Petitioner failed to establish a *prima facie* case of discrimination under *Notari's* alternative method for proving a *prima facie* case: presenting "indirect evidence sufficient to support a reasonable probability that but for her status the challenged employment decision would have favored the plaintiff." Specifically, the Court found that because different decision makers participated in the employment decisions involving Petitioner and her alleged comparator, the two cases were not similar. (App. 17a-18a). The District Court further found that Petitioner and her alleged comparator were not "similarly situated" in that the comparator had permission to charge the personal expenses. (App. 18a). Under these

circumstances, the District Court held that Petitioner lacked the evidence sufficient to raise an inference of discrimination. (App. 18a). As Petitioner could not state a *prima facie* case under either *Notari* test, U S WEST's motion for summary judgment was granted. (App. 17a-18a). The Tenth Circuit affirmed the Judgment of the District Court. (App. at 4a-5a).

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

The thrust of Petitioner's argument for a grant of certiorari is that the Tenth Circuit applied a higher burden upon her (a Caucasian) than it requires of a minority plaintiff to establish a *prima facie* case of discrimination under Title VII. The heightened burden, she argues, is contrary to the spirit of Title VII and the mandates of this Court in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976), that whites and non-whites be protected from discrimination "upon the same standards." (Pet. at 8-9).

Petitioner's argument is without merit. The Tenth Circuit standard by which Petitioner's *prima facie* case was measured is the same fundamental standard that has been cited in every decision of this Court discussing the *prima facie* case in the 30 years since *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), was decided. To review the Tenth Circuit decision below is to question three decades of Supreme Court precedent.

The decision below is unquestionably consistent with *McDonald*. Petitioner was not subject to a heightened burden to establish her *prima facie* case of disparate discipline.

To the contrary, the "traditional" test Petitioner seeks to have applied to her case is identical to the one applied to her by the District Court and the Tenth Circuit below.

A. The *Prima Facie* Case Requirements Applied To Petitioner In The Decision Below Are Consistent With *McDonnell Douglas*.

1. The *McDonnell Douglas Prima Facie* Case Is Simply A Requirement That The Plaintiff Present Evidence Sufficient To Create An Inference of Discrimination.

Title VII prohibits discrimination in employment based on certain impermissible factors such as race and gender. 42 U.S.C. § 2000e-2. In *McDonnell Douglas*, this Court outlined the now familiar framework for analyzing Title VII claims of disparate treatment. *Id.* at 800. First, a plaintiff has the burden of proving a *prima facie* case of discrimination. *Id.* at 802. A *prima facie* case establishes an inference or presumption of discrimination. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Then, if plaintiff successfully states his or her *prima facie* case, the burden shifts to the defendant employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. If the defendant carries its burden, the adverse inference is dispelled and the plaintiff then has an opportunity to prove, by a preponderance of the evidence, that the legitimate reason offered by the defendant was not its true reason, but was a pretext for discrimination. *Id.* at 804.

McDonnell Douglas involved an African-American male alleging that he was not hired because of his race. *Id.* at 796.

On these facts, this Court concluded that the Petitioner could establish his *prima facie* case of racial discrimination by showing

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802.

The reason the four factors in the *McDonnell Douglas prima facie* case, if proven, are deemed to create an inference of discrimination is because when the two most common legitimate reasons for rejection are removed (lack of an opening or lack of qualifications), this country's history of racism makes it more likely than not that, absent an explanation, the rejection of a qualified minority candidate is based on discrimination. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977); *Furnco Constr. Corp.*, 438 U.S. at 577; *Iadimarco v. Runyon*, 190 F.3d 151, 158 (3d Cir. 1999).

This Court noted, however, that the pattern of proof for establishing a *prima facie* case must be flexible because "the facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required . . . is not necessarily applicable in every respect in differing factual situations." *McDonnell Douglas*, 411 U.S. at 802 n.13. This Court has reiterated that principle on many different

occasions. *See, e.g., Furnco Constr. Corp.*, 438 U.S. at 577 ("The method suggested in *McDonnell Douglas* . . . was never intended to be rigid, mechanized, or ritualistic."); *Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) ("this standard is not inflexible"); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) ("the *prima facie* case operates as a flexible evidentiary standard").

Although the elements of the *prima facie* case have been articulated in different ways by this Court and courts throughout the country, the various formulations have all been designed to determine whether the plaintiff has evidence supporting an inference of discrimination – a requirement made clear by decades of Supreme Court precedent:

> The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

Int'l Bhd. of Teamsters, 431 U.S. at 358; *see also Furnco Constr. Corp.*, 438 U.S. at 576:

> A *McDonnell Douglas prima facie* showing is not the equivalent of a factual finding of discrimination[]. Rather, it is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations.

The focus on evidence sufficient to create an inference of discrimination was most recently reaffirmed in *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996). There, this Court eliminated a prong of the Fourth Circuit's *prima facie* case for age discrimination (that the worker be replaced by a person under 40) in favor of a more general showing of "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion." *Id.* at 312-13. This is exactly what the Tenth Circuit did in *Notari*: bypassing specific criteria for a general showing of evidence sufficient to create an inference of discrimination. 971 F.2d at 590.[1]

O'Connor reaffirmed that the hallmark or cornerstone of the *prima facie* case is evidence sufficient to establish an inference of discrimination – so much so that the standard can become the test itself.

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1. This Court created a similar test in *Burdine*: "plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." 450 U.S. at 253.

2. The Tenth Circuit Standard For Establishing A *Prima Facie* Case Of Reverse Discrimination Upholds This Long-Standing *McDonnell Douglas* Requirement.

Though virtually ignored by Petitioner, the Tenth Circuit actually offers two ways, other than by direct evidence, that a plaintiff may establish a *prima facie* case on a reverse discrimination claim: (i) establishing the *McDonnell Douglas* factors with a "background circumstances test" substituted for "racial minority" status or (ii) generally presenting evidence sufficient to establish an inference of discrimination. *See Notari v. Denver Water Dep't*, 971 F.2d 585, 589-90 (10th Cir. 1992).[2] Both of these standards were applied to Petitioner. She failed both tests. (App. 14a, 18a).

In *Notari*, a promotion was given to a woman over a man who was rated higher than the woman by their supervisors. *Id.* at 586-87. He filed a claim for sex discrimination. *Id.* at 587. The District Court dismissed his claim for failure to state a *prima facie* case of discrimination on the ground that he failed to show background circumstances that would support an inference that the respondent was "one of those unusual employers that discriminates against the majority." *Id.* at 588. The Tenth Circuit reversed and remanded the case to the District Court to apply an alternate test. *Id.* at 590.

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2. The general evidence cannot, however, be comprised solely of the four facts set out in the *McDonnell Douglas prima facie* case. *Id.* at 590.

The starting point for the Tenth Circuit was the *McDonnell Douglas* four-pronged *prima facie* case. *Id.* at 588. It then determined that

> [i]t is appropriate to adjust the prima facie case to reflect" the reverse discrimination context of a lawsuit because the presumptions in a Title VII analysis that are valid when a plaintiff belongs to a disfavored group are not necessarily justified when the plaintiff is a member of a historically favored group.

Id. at 589.[3] As a result, the Tenth Circuit held that in lieu of showing membership in a traditionally disfavored group (the first prong of the *McDonnell Douglas* test), a plaintiff in a reverse discrimination case has to meet the "background circumstances" test employed by the District Court. *Id.* at 588-89. Only then is the presumption of race discrimination and the burden-shift to the employer justified.

Because of a concern that discrimination could occur even where "background circumstances" were absent, however, the Tenth Circuit determined that an alternative for establishing a *prima facie* case should be available in the reverse discrimination context:

> A given employer may discriminate against an individual white worker even when no evidence demonstrates that the employer generally favors workers who belong to historically disadvantaged groups.

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3. In other words, absent a history of discrimination, the fact a majority plaintiff was qualified for a job (not more qualified) and did not obtain it does not justify the presumption that it is more likely than not that the true reason for the rejection was racial bias.

Id. at 590. Therefore, the Tenth Circuit decided that rather than trying to fit the reverse discrimination case into the *McDonnell Douglas prima facie* formulae, "a plaintiff who presents . . . indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff states a prima facie case of intentional discrimination under Title VII." *Id.* at 590. Under this test, "the plaintiff must allege and produce evidence to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred." *Id.* (emphasis added).[4]

This standard is essentially the same as the standard repeated again and again by this Court for establishing a *prima facie* case: "*showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion . . .*'" *Furnco Constr. Corp.*, 438 U.S. at 576 (emphasis added); *O'Connor*, 517 U.S. at 312. The fact that the pattern of proof required may be ever so slightly different, as it is every time the factual circumstances change, is not significant. To take issue with the Tenth Circuit standard here is to question years of Supreme Court precedent on this issue.

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4. The Third Circuit has established a very similar test:

> all that should be required to establish a *prima facie* case in the context of "reverse discrimination" is for the plaintiff to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII.

Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999).

Contrary to Petitioner's argument, this standard does not focus on discrimination against a group rather than an individual. (Pet. at 10). As recognized by the District Court, this concern was addressed by the Tenth Circuit's adoption of the alternative standard. (App. 14a n.3). Nor does the Tenth Circuit test require evidence only presented at the pretext stage. (Pet. at 11). To the contrary, the Supreme Court has already approved the use of this same standard as part of the *prima facie* case under Title VII in multiple cases. *See O'Connor*, 517 U.S. at 312-13; *Burdine*, 450 U.S. at 253. The evidence required by the standard is not onerous. *See, e.g., Taken v. Oklahoma Corp. Comm'n*, 934 F. Supp. 1294, 1298 (W.D. Okla. 1996), *aff'd*, 125 F.3d 1366 (10th Cir. 1997) (racial make-up of department or managers and relevant discriminatory statements could be evidence sufficient to meet the standard); *Archuletta v. Colorado Dep't of Prob.*, 46 F. Supp. 2d 1100, 1005 (D. Colo. 1998) (evidence of dissimilar treatment could be sufficient). The Tenth Circuit standard is fully compliant with *McDonnell Douglas*.

B. There Is No Difference Within The Tenth Circuit Between The *Prima Facie* Case Requirements Applied To Petitioner Below And The Prima Facie Requirements For A Minority Plaintiff To Establish The Same Case Of Disparate Discipline.

Not only is the Tenth Circuit standard about which Petitioner complains fully compliant with *McDonnell Douglas*, but it is also compliant with *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). There is no difference between the standard applied to Petitioner below and the Tenth Circuit standard for stating a "traditional" claim of disparate discipline that Petitioner now seeks to have applied to her case. Petitioner's complaint regarding a "heightened standard" is a fallacy.

Petitioner's race discrimination claim is one of disparate discipline – that she was treated more severely for her poor conduct than another person of a different race. (Pet. at 2-3). The *prima facie* case Petitioner seeks to have applied to her is set forth in *Trujillo v. Univ. of Colorado Health Scis. Ctr.*, 157 F.3d 1211, 1215 (10th Cir. 1998). There, a Hispanic male alleged he was discharged for certain conduct when non-Hispanic employees were not. *Id.* at 1213. The Court applied the following test to determine whether he could establish a prima facie case of discrimination: (1) he was a member of a protected group; (2) he suffered an adverse employment action; and (3) his employer treated similarly situated employees differently.[5]

Although Petitioner did not cite to it, another panel of the Tenth Circuit more recently stated the test differently:

> A plaintiff in a discriminatory suspension case . . . makes out a prima facie case upon showing: (1) that plaintiff belongs to a protected class; (2) that he suffered an adverse employment action; and (3) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination.

Hysten v. Burlington N. and Santa Fe Ry. Co., 296 F.3d 1177, 1181 (10th Cir. 2002). The Court, which disagreed with the District Court's application of the *Trujillo* standard because it "may have overstated plaintiff's prima facie burden,"

5. "A plaintiff wishing to prove discriminatory animus with evidence that his employer treated him differently from other employees bears the burden of showing that the comparison is legally relevant – i.e., that the employees were similarly situated." *Watts v. City of Norman*, 270 F.3d 1288, 1293 (10th Cir. 2001), *cert. denied*, 535 U.S. 1055 (2002).

remarked that "[o]ur disagreement with the district court is largely one over semantics because ordinarily the third part of this test will be satisfied by proof that the employer treated similarly situated employees more favorably." *Id.*

There is simply no difference between either of these standards and the standard applied to Petitioner: to produce evidence "sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred." *Notari*, 971 F.2d at 590. Each have the simple requirement that a plaintiff present some form of evidence that raises an inference of discrimination (that, but for her status, the discriminatory action would not have occurred). Petitioner simply was not subjected to a different standard.

Because the standards are identical, Petitioner's real complaint is that she does not like how the lower courts applied the one, consistent standard to the facts of her case. Petitioner's brief makes that point clear. Since Petitioner does not and cannot distinguish between the *Notari* alternative test and the *Trujillo* test, she argues that the lower courts erroneously applied *both* of these standards to the facts of her case:

> Th[e] reasoning [of *McDonald*] is entirely undermined by requiring plaintiffs who are not in a minority group are subjected [sic] to a higher burden in order to establish a prima facie case for discrimination. Here, indirect evidence supports a reasonable probability that [Petitioner] would not have been disciplined if her race was African-American rather than Caucasian. Such evidence is sufficient to establish a *prima facie* case of

> discrimination. *Notari v. Denver Water Dep't.*, 971 F.2d at 590.

(Pet. at 9). Later, Petitioner argued:

> Here, Plaintiff established a prima facie claim of discrimination by establishing that: (1) she was a member of a protected group; she suffered an adverse employment action, and (2) she was treated differently and less favorably than a similarly situated African-American employee. *See Trujillo v. University of Colorado Health Sciences Ctr.*, 157 F.3d 1211, 1215 (10th Cir. 1998).

(Pet. at 12).

Petitioner's ambivalence about which test to use is a recognition that there is no practical difference between the majority and minority plaintiff tests in the Tenth Circuit. Therefore, the issue raised by Petitioner is not actually presented by this case. Not only does this mean that Petitioner lacks a basis for her complaint about a heightened standard, but it also means that this case does not present a meaningful opportunity for this Court to compare two different standards of proof. A grant of certiorari is not warranted here.

II. THE QUESTION PRESENTED HAS NO BEARING ON THE OUTCOME OF THIS CASE.

This is not a case, as Petitioner would have the Court believe, of a Caucasian plaintiff deprived of an opportunity to get to a jury on facts raising an inference of discrimination simply because she is Caucasian. Petitioner was unsuccessful

in the courts below not because she was subjected to some different standard, but because she did not have one shred of evidence that she was subjected to any discrimination. Even if the standard for a *prima facie* case applied to Petitioner below was materially different from the standard applied to a minority plaintiff on the same claim (which it was not, *see* Section I(B)), the Court would not even need to reach the question presented by Petitioner. By virtue of the absence of any evidence of discrimination, Petitioner cannot satisfy any *prima facie* test.

The District Court made two determinations that were upheld on appeal to the Tenth Circuit. First, the District Court held that because Petitioner was employed in a department that had a Caucasian majority of workers and managers, and because she never heard any racial remarks from management or witnessed any racial discrimination in her 22 years at U S WEST, Petitioner did not present any background circumstances to support an inference that U S WEST was one of those unusual employers who discriminates against the majority. (App. 13a).

Second, because the Petitioner could not dispute that the employment and disciplinary decisions made about her case and that of the African-American woman to whom she compared herself were made by different sets of people, Petitioner could not establish that she was similarly situated to the co-worker in question. (App. 17a). That comparison, therefore, was legally irrelevant.[6] Because she did not have any evidence that a similarly situated person was treated dissimilarly, the District Court found that Petitioner also

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6. *See supra* note 5.

failed *Notari*'s alternative test: that she present "evidence to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred." (App. 18a).

However, because she does not have any evidence that a similarly situated person was treated dissimilarly, or any other evidence of discrimination, Petitioner would also fail the test she seeks to have applied to her from *Trujillo*. As a result, her total lack of evidence of discrimination and inability to meet either test would allow this Court to resolve this case without even addressing the issue of the applicable standard. Therefore, the question presented has no bearing on the outcome of this case and the petition for certiorari should be denied.

III. THERE IS NO CIRCUIT SPLIT REGARDING THE BURDEN OF PROOF REQUIRED TO ESTABLISH A PRIMA FACIE CASE OF REVERSE DISCRIMINATION AND THE SPLIT REGARDING THE PRECISE PATTERN OF PROOF REQUIRED IS NOT A COMPELLING REASON TO GRANT CERTIORARI HERE.

Petitioner cites to a split between the circuits regarding "the burden a victim of reverse discrimination has in establishing a prima facie claim of discrimination" as a reason for granting certiorari. (Pet. at 4). Actually, the circuits are not split regarding the plaintiff's *burden* of proof. The circuit courts have been clear that plaintiff's burden to establish a prima facie case of discrimination, reverse or otherwise, is to offer evidence sufficient to support an inference of

discrimination. *Compare Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1104 (11th Cir. 2001) (cited by Petitioner as a Circuit decision which does not distinguish between race and reverse race discrimination claims) *with Harding v. Gray*, 9 F.3d 150, 152-53 (D.C. Cir. 1993) (the leading Circuit case utilizing a "background circumstances" test in a reverse discrimination claim). Both cases, despite their different *patterns* of proof, recognize that the *McDonnell Douglas prima facie* case requires indirect evidence sufficient to create an inference of discrimination. *Bass*, 256 F.3d at 1104; *Harding*, 9 F.3d at 152-53. This is true for the other circuits as well. *See, e.g., Notari*, 971 F.2d at 589; *Iadimarco*, 190 F.3d at 160.

The split referenced by Petitioner actually relates to the more technical issue of the precise *pattern* of proof required to meet this initial burden in a reverse discrimination case, an issue this Court noted was not key to the *McDonnell Douglas* analysis. *See Int'l Bhd. of Teamsters*, 431 U.S. at 358. The pattern of proof in the Eleventh Circuit is a slightly modified *McDonnell Douglas prima facie* case: plaintiff must show (1) he was qualified and applied for the position; (2) he was rejected; and (3) that other equally or less qualified employees who are not white were hired. *See Bass*, 256 F.3d at 1104. The D.C. Circuit offers a different modification. Because "[i]nvidious racial discrimination against whites is relatively uncommon in our society, and so there is nothing inherently suspicious in an employer's decision to promote a qualified minority applicant instead of a qualified white applicant," the D.C. Circuit requires a reverse discrimination plaintiff, in lieu of showing membership in a racial minority, to show "background circumstances that support an inference that the defendant is one of those unusual employers who

discriminates against the majority." *Harding*, 9 F.3d at 153.[7] The Tenth and Third Circuits state the test more generally: any evidence sufficient to support a reasonable inference of discrimination. *See Notari*, 971 F.2d at 590; *Iadimarco*, 190 F.3d at 161.[8]

While there is a difference between the circuit courts on the precise pattern of proof required, as a practical matter, the difference is minor and does not present a compelling reason to grant certiorari. For example, while it is true that a reverse discrimination plaintiff cannot, under *Notari*, rely on just the facts that he or she was qualified, was rejected and that the position was offered to someone else or left open (the *McDonnell Douglas* factors applied by the Eleventh Circuit), *see Notari*, 971 F.2d at 590, he or she can cite to similar, easily attainable pieces of evidence that would establish an inference of discrimination. *See, e.g., Taken*, 934 F. Supp. at 1298 (racial make-up of department or managers and discriminatory statements); *Archuletta*, 46 F. Supp. 2d at 1005 (dissimilar treatment).

Likewise, a closer review of the "background circumstances" test demonstrates that it, too, is not very different from the Eleventh Circuit test or the Tenth Circuit (*Notari*) test. The D.C. Circuit has clarified that background

7. This is the same test as the first alternative available to a plaintiff under *Notari*, 971 F.2d at 590.

8. Despite Petitioner's assertion that the Seventh Circuit test is a "background circumstances" test, it actually offers two alternatives for establishing a *prima facie* case of reverse discrimination: "background circumstances" or evidence "establish[ing] a logical reason to believe that the [employer's] decision rests on a legally forbidden ground." *Mills v. Health Care Servs. Corp.*, 171 F.3d 450, 457 (7th Cir. 1999). In this way, it is more comparable to *Notari* and *Iadimarco*.

circumstances can include "evidence indicating that there is something 'fishy' about the facts of the case at hand that raises an inference of discrimination." *Harding*, 9 F.3d at 153. This proof requirement is similar to the standard set forth in *O'Connor*, 517 U.S. at 312-13, *Burdine*, 450 U.S. at 253 and *Notari*, 971 F.2d at 590. Allegations of background circumstances, therefore, have included simple allegations such as plaintiff's superior qualifications, departures from typical hiring procedures and giving little consideration to the plaintiff. *Harding*, 9 F.3d at 153.

This difference between the circuits in the proof required to establish an inference of discrimination is not dramatic. The proof required is not harder to discover or obtain. It is simply different, a difference justified by the different factual circumstances of having a majority plaintiff. Both the *Notari* alternative test and the "background circumstances" test, though differently stated, simply recognize that some additional proof, beyond the fact the person was qualified and rejected in favor of another person outside his group, is necessary to justify an inference of discrimination where a history of racism is absent. Otherwise, the presumption of discrimination that the *McDonnell Douglas* burden-shifting framework relies upon is unwarranted. *See Notari*, 971 F.2d at 590; *Harding*, 9 F.3d at 153-54.

The split between the circuits here is minor and tolerable. Even if this Court wanted to address it, this case does not present a meaningful opportunity to do so. The standards within the Tenth Circuit for a traditional claim of disparate discipline and a reverse discrimination claim of disparate discipline are equivalent – there is no meaningful contrast between the two standards. Second, even if the standards were different, Petitioner's case would fail to meet either on its facts. This Court would never even reach the issue presented.

CONCLUSION

For these reasons, the Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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